IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.252 OF 2006

M/s. Dimple Audio Video Pvt. Ltd. Co.)
Company incorporated under the)
Companies Act, 1956 having its)
Registered Office at A/1 Lal Deval)
Society, Synagogue Street Pune)
through its Authorized Director)
Mr.Gurmitsingh Sehgal, Age Adult,)
R/at A/1 Lal Deval Society,)
Synagogue Street, Pune 411 001.) ...Appellants

Versus

1. Shri Dinanath Badridas Chhabra)
   Age Adult,)

2. Mrs Anu D. Chabra, Age Adult)

3. Mr Kamal D. Chabre, Age Adult)
   All businessmen and R/at 62/19)
   Green Acres, Salunkhe Vihar Road)
   Pune 411 048.) ...Respondents

Shri R.S.Apte i/by Shri N.R.Bubna for the Appellant.

Shri G.S.Godbole i/by Shri G.H.Keluskar for the Respondent NOs.1 to 3.

CORAM : ABHAY S. OKA, J.

DATE : SEPTEMBER 08, 2006.

ORAL JUDGMENT:

1. On 14th August, 2006 the Second Appeal was heard finally on the following substantial question of law:

. Whether the Appeal preferred by the Appellant before the District Court was maintainable in view of the bar created by sub-section 3 of section 96 of the Code of Civil Procedure, 1908?

2. The submissions were fully heard on 14th August, 2006. On account of paucity of time, on that day, judgment could not be delivered and therefore, for dictation of judgment the Appeal was kept on 19th August, 2006. In the meanwhile, there was a change of roster and therefore, the Appeal was kept on 07th September, 2006 and today for dictation of judgment. On the request made by the learned counsel for the Respondents, today I have allowed him to make further submissions.

3. With a view to appreciate the submissions made by the learned Advocates appearing for the parties, it will be necessary to refer to the facts of the case. The Appellants are the original Plaintiffs and the Respondents are the original Defendants. The Appellants filed a suit against the Respondents for perpetual injunction restraining the Respondents from dispossessing the Appellants from the suit premises

till 16th October, 2005. According to the case of the Appellants, by a memorandum of understanding dated 17th October, 2000, the Respondents allowed the Appellants to use Shop No.B/2, A.B.C admeasuring 153.28 Sq.mtrs. out of total area of 185.80 Sq. mtrs. on stilt floor (lower ground or basement) of the building known as Sterling Centre situated at Moledina Road, Camp, Pune. According to the case of the Appellants, they were allowed to occupy the said shop (hereinafter referred to as the suit premises) till 16th October, 2005. According to the case of the Appellants they were allowed to occupy the suit premises as licensees. According to the case of the Appellants, in the last week of October 2000, the Respondents had a meeting with one of the competitors of the Appellants who offered to pay more consideration to the suit premises. According to the Appellants the Respondent started forcing Appellants to pay Rs.10,000/- per month more in addition to the amount agreed under the memorandum of understanding. In the said suit for injunction, a compromise purshis was purportedly filed by the parties on 08th July, 2002. By order dated 15th July, 2002 the learned 4th Joint Civil Judge, Junior Division, Pune accepted the compromise purshis and passed a separate order on the

plaint by which a decree was passed in the suit in terms of compromise. The said decree was challenged by the Appellants by preferring an Appeal to the District Court. By the impugned judgment and decree dated 08th January, 2006 the learned Adhoc Additional District Judge, Pune dismissed the appeal as not maintainable.

4. Shri Apte, learned Counsel appearing for the Appellants placed reliance on decision of the Apex Court in the case of **Mansukhlal Dhanraj Jain & Ors. Vs. Eknath Vitthal Ogale (AIR 1995 Supreme Court 1102)** and submitted that as the Appellants are alleging that consent decree is obtained by fraud and that they are challenging the decree on the ground of invalidity, the Appeal was maintainable under section 96 of the said Code and bar created by sub-section 3 of section 96 was not applicable. He also placed reliance on another decision of the Apex Court in the case of **Kishun Alias Ram Kishun (Dead) Through LRs. Vs. Behari (Dead) by LRs. ((2005) 6 Supreme Court Cases Page 300)**. He submitted that a question whether there was a valid compromise or not can be gone into in an Appeal preferred under section 96 of the said Code. He also placed reliance on decision of the

learned single Judge of this court in case of **Deorao Vs. Devkichandan Bhojraj Chandak & Anr. (AIR 1984 Bombay Page 474)**. He lastly placed reliance on another decision of the Apex Court in the case of **Banwarilal Vs. Smt. Chando Devi (A.I.R 1993 S.C. Page 113)** and submitted that when validity of a compromise is challenged, the bar under sub-section 3 of section 96 will not apply. Shri Godbole appearing for the Respondents submitted that if there is no dispute about the factum of compromise or factum of consent, the bar under sub-section 3 of section 96 will squarely apply. He submitted that decisions relied upon by the learned counsel for the Appellants cannot be read as precedents laying down proposition of law that when invalidity or illegality of a compromise is set up as challenge to a consent decree, the bar under sub-section 3 of section 96 will not apply. He has taken me through the said decisions and submitted that law laid down by the privy council in the case of **Zahirul Said Alvi Vs. Lachhmi Narayan (AIR 1932 Privy Council 251)** holds the field.

5. I have carefully considered the submissions. I have perused the memorandum of appeal filed by the Appellant before the District Court. In paragraph

No.3 of the memorandum of appeal filed in the District Court, the Appellant has stated thus:

> "3. In furtherance of advice given by Advocate Khambata, Regular Civil Suit NO.3911/2000 came to be filed by the Appellant wherein Advocate Mr. Khambata represented the Appellant. On or about 15/7/2002, the consent terms were drawn and the said suit was disposed off in terms of compromise. The authorized signatory of the Appellant being a layman did not understand the significance of consent terms. Certified copy of decree and consent terms is filed herewith".

6. In the said memorandum of appeal, the Appellant has thereafter referred to regular Darkhast filed by the Respondents for execution of the decree. In the said execution Application, the evidence of the parties was recorded. In paragraph No.11 of the memorandum of appeal, the Appellant has asserted as under:

> "11. The deposition of witness was recorded on 11/9/2003. On that day the Appellant

realized that a systematic fraud has been practiced upon it by both the Respondents as well as Avocate Z.T.Khambta representing the Appellant and who was ethically bound to protect the interests of the Appellants within the 4 corners of law. Since the consent terms which came to be drawn in Regular Civil Suit No.3911/2000 amounted to fraud and unfortunately for the Appellant no one else than the Advocate for Appellant itself was also party to it, the Appellant is filing this Appeal against the decree which was passed in Regular Civil Suit No.3911/2000 in terms of compromise".

7. Broadly, the grounds which are mentioned in the memorandum of appeal are (i) the impugned Judgment and Decree is void ab initio as same is brought into existence by practising fraud upon the Appellant, (ii) the Trial Court had no jurisdiction to entertain and try the suit and (iii) fraud was practised upon the Appellant and the Appellant was induced to file the suit. The consent terms were prepared and approved by the same Advocate who induced the Appellant to file the suit.

8. Thus, factually there is no challenge to the fact that compromise was filed duly signed by the parties and the same was recorded by the Trial Court.

9. It will be necessary to refer to the relevant statutory provisions. Sub-section 3 of section 96 of the Code of Civil Procedure, 1908 reads thus:

> "(3) No appeal shall lie from a decree passed by the Court with the consent of the parties".

10. The other relevant provision is Rule 1-A of Order XLIII of the said Code which reads as under:

> "1-A. Right to challenge non-appealable orders in appeal against decrees.-(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

> (2) **In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded**".(Emphasis supplied)

11. Shri Apte placed reliance on the decision of the Apex Court in the case of **Banwari Lal Vs. Chando Devi (through L.R.) (AIR 1993 Supreme Court Cases Page 1139)**. In the said case before the Apex Court the Appellant was the Plaintiff in a suit in which a compromise was filed. The Trial Court passed an order taking the compromise document on record and recorded statement of the Advocate appearing for the Plaintiff that the suit was to be dismissed as withdrawn as per the compromise. Accordingly, an order was passed by the Trial Court. Thereafter an Application was filed by the Plaintiff alleging fraud on the part of the Defendant No.2 and it was contended that the compromise was void and illegal. The Trial Court recalled the order disposing of the suit on the ground that the compromise was not signed by both the parties as required by Rule 3 of Order XXIII of the said Code.

A Revision Application was filed before the High Court for challenging the order. The High Court held that the Application was infact under Rule 1 of Order XXIII of the Code for withdrawal of the suit and therefore, the order passed by the learned Judge could not be treated as one under Rule 3 of Order XXIII. The Apex Court had occasion to consider the provisions of section 96 and in particular sub-section 3 thereof as well as Rule 1A of order XLIII. In paragraph No.9 the Apex Court held thus:

> "Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When S.96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. Once such remedy available was by filing the Appeal under O 43 Rule 1(m). If the order recording compromise was set aside, there was no necessity or occasion to file an

> appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3(A) of Order 23. **As such a right has been given under R.1A(2) of O.43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree**. S.96(3) of the Code shall not be a bar to such an appeal because S.96(3) is applicable to cases where the factum of compromise or agreement is not in dispute". (Emphasis supplied)

In paragraph No.13 of the said decision, the Apex Court proceeded to hold that:

> "13. When the amending Act introduced a proviso along with an explanation to Rule 3 of O.23 saying that where it is alleged by one

party and denied by other that an adjustment or satisfaction has been arrived at, "the court shall decide the question", the court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an Agreement or compromise "which is void or voidable under the Indian Contract Act....." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even R.1(m) of O.43 has been deleted under which an appeal was maintainable against an order recording a compromise. **As such a party challenging a compromise can file a petition under proviso to R.3 of O.23, or an appeal under S.96(1) of the Code, in which he can now question the**

validity of the compromise in view of R.1A of O.43 of the Code".(Empahsis supplied)

The Apex Court in paragraph No.13 has held that the court which entertains a Petition for recording compromise has to examine whether compromise was void or voidable under the Indian Contract Act. The Apex Court held that a party challenging compromise can also file Appeal under section 96(1) in which he can now question the validity of compromise in view of Rule 1A (2) of Order XLIII of the said Code. Moreover, in paragraph No.9 of the said decision the Apex Court observed that section 96 (3) of the Code shall not be a bar to an Appeal at the instance of the party who challenges the recording of the compromise. At this stage, it will be necessary to refer to decision of the Apex Court in the case of Kishun (Supra). The Apex Court in paragraph No.7 of the said decision held that when there is a contest on the question whether there was a compromise or not, a decree accepting compromise on resolution of that controversy cannot be said to be a decree passed with the consent of the parties and therefore, bar under sub-section 3 of section 96 will not apply in such case.

12. Turning back to the facts of the present case in the memorandum of Appeal, the allegation is that the compromise was brought into existence by practising fraud upon the Appellants. I have already referred to paragraph No.11 of the memorandum of the Appeal. Thus, this is not a case where the Appellants have accepted that with their free consent, the consent terms were filed. The contention of the Appellants is that there was a fraud practised while recording a compromise. In paragraph No.13 of the decision of the Apex Court in the case of Banwarilal, it is held that an agreement or compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of Rule 3 of Order XXIII. The Apex Court has held that while challenging the decree passed on the basis of compromise, the question of validity of the compromise can be gone into. In addition to invalidity, another ground in the memorandum of Appeal is that the Trial Court had no jurisdiction to pass the Decree which has been passed on the basis of compromise. Taking into consideration the grounds of challenge in the Appeal filed in the District Court and in view of the law laid down by the Apex Court, bar created by

sub-section 3 of section 96 will not apply. In this case sub-rule (2) of rule 1A of Order XLIII of the Code will apply.

13. The first Appellate Court has dismissed the Appeal as not maintainable. Though there are some observations made on merits, the finding of the court is that the Appeal was not maintainable. Shri Godbole tried to submit that plea of fraud cannot be established in Appeal and it can be proved only by way of a civil suit. However, I am not dealing with the said aspect. I am only concerned with limited issue of maintainability of the Appeal. Whether plea of fraud is established or not is a question to be decided by the first Appellate Court. Hence, Appeal must partly succeed.

14. Accordingly, I pass the following order:

(i) The impugned Judgment and Decree dated 18th January, 2006 is quashed and set aside.

(ii) Civil Appeal No.208 of 2004 is restored to the file. The said Appeal shall be decided on its own merits as expeditiously as possible and

preferably within a period of six months from the date of receipt of Writ of this order.

(iii) All contentions on merits are expressly kept open.

(iv) Accordingly, Second Appeal is partly allowed with no order as to costs.

(v) Writ to be sent forthwith.

JUDGE